

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Case No: 19-2493

Rohit Kumar
Plaintiff - Appellant

v.

William P. Barr, Attorney General of United
States (Matthew G. Whittaker named on original
complaint); Joseph P. Kelly; Jessie K. Liu

Defendants - Appellees

Appeal from U.S. District Court for the District of
Nebraska - Omaha
(8:18-cv-00578-JMG)

Dec 20, 2019

JUDGMENT

Before STRAS, WOLLMAN, and KOBES, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

December 20, 2019

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appellate Case: 19-2493

Date Filed: 12/20/2019 Entry ID: 486405

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA
OMAHA DIVISION

Docket No: 8:18-CV-578

MEMORANDUM AND ORDER

Filed: 05/28/19

This matter is before the Court on the defendants' motion to dismiss (filing 12). Because the Court finds that the plaintiff has failed to state a claim upon which relief may be granted, the Court will dismiss his complaint pursuant to Fed. R. Civ. P. 12(b)(6).

Although the plaintiff's pleadings are lengthy, see filing 1; filing 16, his factual allegations are simple: he accuses (former) officials of the Department of Justice of engaging in "criminal activity" which has resulted in "24by7 illegal FBI Surveillance" against him. Filing 1 at 4-5. He blames this criminality on (former) Deputy Attorney General Rod Rosenstein, (former) Special Counsel Robert Mueller, and (former) FBI Director James Comey, acting to further

the criminal conduct of "W and Hussein" (presumably former Presidents George W. Bush and Barack Obama). Filing 1 at 4. Despite that, the defendants actually named in his complaint are (former) Acting Attorney General Matthew Whitaker, U.S. Attorney for the District of Nebraska Joe Kelly, and U.S. Attorney for the District of Columbia Jessie Liu.² Filing 1 at 2.

A complaint must set forth a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). This standard does not require detailed factual allegations, but it demands more than an unadorned accusation. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). For the purposes of a motion to dismiss the Court must take all of the factual allegations in the complaint as true, but is not bound to accept as true a legal conclusion couched as a factual allegation. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). And to survive a motion to dismiss under Rule 12(b)(6), a complaint must also contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Iqbal*, 556 U.S. at 678.

A claim has facial plausibility when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* The Court must assume the truth of the plaintiff's factual allegations, and a well-pleaded complaint may proceed, even if it strikes a savvy judge that actual proof of those facts is improbable, and that recovery is very remote and unlikely. See *Twombly*, 550 U.S. at 556. But where the well-pleaded facts do not permit the Court to infer more than the mere possibility of misconduct, the

complaint has alleged—but has not shown—that the pleader is entitled to relief. *Iqbal*, 556 U.S. at 679.

The plaintiff has not shown that he has entitled to relief here, for three primary reasons. First, there is no particular connection between the surveillance the plaintiff alleges and the defendants he chose to sue. An actionable claim requires an injury fairly traceable to the challenged action of the defendants, not the result of independent action of some third party not before the Court. *Stamm v. Cty. of Cheyenne, Neb.*, 326 F. Supp. 3d 832, 859 (D. Neb. 2018).

Second, even if some connection could be assumed based on the official duties of these official-capacity defendants, the alleged facts do not establish illegality—and whether challenged conduct is "illegal" is by definition a legal conclusion the Court is not obliged to accept as true. *Twombly*, 550 U.S. at 555. The plaintiff alleges he is being surveilled by the FBI—but not all surveillance is unlawful. Even very intrusive surveillance can be authorized by a court. See *United States v. U.S. Dist. Court for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 321 (1972). And a good deal of "surveillance" doesn't even require that. See *Kyllo v. United States*, 533 U.S. 27, 31-32 (2001); cf. *United States v. Jones*, 565 U.S. 400, 429 (2012). The facts the plaintiff alleged might permit the Court to infer the possibility of misconduct, but they do not show he is entitled to relief. *Iqbal*, 556 U.S. at 679. The plaintiff's pleadings, in fact, tender no more than a naked assertion, devoid of further factual enhancement. See *id.* at 678.3

Finally, the plaintiff has also failed to clear the bar of stating a claim that is "plausible on its face." See *id.* The complaint simply provides no basis to believe that two former presidents, and several former high-ranking members of the Justice Department, have taken an interest in what the plaintiff is doing at all times—nor any basis to believe that all those former federal officials retain any authority over the FBI. (And because it appears the plaintiff's requested relief is forward-looking, see filing 16 at 11, the authority of the people he actually accuses of misconduct is highly pertinent.) Even if his allegations of surveillance are accepted, despite being "unrealistic or nonsensical," the conspiracy the plaintiff alleges isn't plausible. See *id.* at 681.4 In sum, the Court concludes that the plaintiff's bare allegation of "FBI surveillance" is insufficient to state a claim for relief. Accordingly, the Court will grant the defendants' motion to dismiss.

IT IS ORDERED:

The defendants' motion to dismiss (filing 12) is granted.

The plaintiff's complaint is dismissed.

A separate judgment will be entered.

Dated this 28th day of May, 2019.

BY THE COURT:

S/_____

John M. Gerrard

Chief United States District Judge

For the sake of completeness, the Court notes the plaintiff's "disclosure" (filing 23), which the Court struck as an amended pleading not authorized pursuant to the Court's rules. But even if properly presented, that filing—which purports to connect the alleged conspiracy to other misfortunes, such as the denial of the plaintiff's visa application and the loss of his job—does not state a plausible claim for relief. While the Court is not unsympathetic to the plaintiff's hard luck, he has not alleged facts sufficient to connect those events to a conspiracy.

APPENDIX C

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No: 19-2493

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Plaintiff - Appellant**

v.

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ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 16, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appellate Case: 19-249

Date Filed: 01/16/2020 Entry ID: 4871800